

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

9 THOMAS J. BALBONI, JR.,)
10 Petitioner,) 3:11-cv-00457-RCJ-VPC
11 vs.)
12 RENEE BAKER, *et al.*,)
13 Respondents.)

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15 This action is a *pro se* petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254,
16 by a Nevada state prisoner. Before the Court is respondents' motion to dismiss the petition (ECF
17 No. 11).

18 || I. Procedural History

19 On June 3, 2004, the State filed an information charging petitioner with a single count of
20 sexual assault. (Exhibit 8).¹ On January 6, 2006, the State filed an amended information reducing
21 the charged offense to a single count of lewdness with a minor under the age of fourteen. (Exhibit
22 26). Prior to entry of his plea, petitioner underwent competency evaluations and the state court
23 found petitioner competent to proceed. (Exhibit 23, at p. 25). On January 10, 2006, petitioner

¹ The exhibits referenced in this order are found in the Court's record at ECF Nos. 12, 13, 14, 15, 16, 26, and 32.

1 executed a guilty plea memorandum and entered an *Alford* plea of guilty to the charge of lewdness
2 with a minor under the age of fourteen. (Exhibits 27, 28).

3 On April 13, 2006, the state district court sentenced petitioner to a maximum term of
4 incarceration of 180 months with a minimum parole eligibility beginning after sixty months.
5 (Exhibit 30). The judgment of conviction was entered on April 13, 2006. (Exhibit 31). Petitioner
6 filed a notice of appeal on August 28, 2007, well after the expiration of the time for filing a notice of
7 appeal pursuant to Rule 4(b) of the Nevada Rules of Appeal Procedure. (Exhibit 33). On September
8 25, 2007, the Nevada Supreme Court entered a written order dismissing the appeal in Case No.
9 50112, because the untimely notice of appeal failed to vest jurisdiction with the Nevada Supreme
10 Court. (Exhibit 38).

11 Beginning June 30, 2008, petitioner filed a series of motions in the state district court seeking
12 an order vacating his sentence or allowing him to withdraw his *Alford* plea. (Exhibits 40, 47, 51, 54,
13 55). The only motions petitioner submitted to the state district court for a decision were two
14 identical motions to vacate the sentence, filed by petitioner on June 30, 2008, and September 15,
15 2008. (Exhibits 40, 42, 47, 48, 52). Both motions were accompanied by a supporting affidavit.
16 (Exhibits 40, 47).

17 On August 13, 2009, the state district court issued an order addressing the motion and
18 affidavit that petitioner had filed on September 15, 2008. (Exhibit 56). By way of the motions for
19 vacate and accompanying affidavits, petitioner sought to assert a constitutional violation based on
20 the fact that he was not read his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). (Exhibit 47).
21 While the motion asserted that the Reno Police Department failed to read petitioner his rights prior
22 to questioning him (Exhibit 47, at p. 1), the accompanying affidavit asserted that petitioner was not
23 read his rights “at the time [he] was convicted . . .” (Exhibit 47, at p. 4). In its order, the state
24 district court denied the motion as “an improper *ex parte* communication” due to the absence of a
25 certificate of service. (Exhibit 56). However, the state district court reviewed the affidavit, which
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1 the court found lacking merit because petitioner “offer[ed] no explanation as to how a failure to read
2 the *Miranda* warnings at the time of conviction amounts to a Constitutional violation.” (Exhibit 56).
3 The state district court denied the June 30, 2008 motion and affidavit. (Exhibit 56).

4 On appeal, in Case No. 55158, the Nevada Supreme Court affirmed the denial of the motions
5 without requiring briefing from the parties, because petitioner did not present a claim in the state
6 district court that would permit modification or correction of his sentence in accordance with state
7 law, and because petitioner should have raised claims attacking the validity of his conviction by way
8 of a post-conviction state habeas corpus petition. (Exhibit 122).

9 On December 24, 2009, petitioner filed a post-conviction habeas petition in state district
10 court. (Exhibit 57). The state district court appointed counsel, who filed a supplemental petition.
11 (Exhibits 75 & 87). The State filed a motion to dismiss petitioner’s state habeas petitions, which the
12 state district court granted, finding the petitions untimely pursuant to NRS 34.726. (Exhibits 94, 98,
13 106). Petitioner appealed from the dismissal of his state habeas petitions. (Exhibit 115). On June 8,
14 2011, in Case No. 57262, the Nevada Supreme Court entered an order of affirmance of the state
15 district court’s order dismissing the state petitions. (Exhibit 129).

16 On September 14, 2011, petitioner filed a request for leave to file a late direct appeal with the
17 state district court. (Exhibit 136). The state district court denied the request on November 21, 2011.
18 (Exhibit 1, at ECF No. 25).

19 Petitioner dispatched his federal habeas petition to this Court on June 24, 2011. (ECF No. 5,
20 at p. 1, numbered item 5). Petitioner raises two grounds in the federal habeas petition. In Ground
21 One, petitioner asserts that he did not make a knowing, voluntary, and intelligent waiver of his right
22 to counsel when he was questioned by the Reno Police Department in connection with this case.
23 (ECF No. 5, at p. 3). In Ground Two, petitioner alleges that his counsel was ineffective based on (1)
24 counsel’s failure to interview the victim or have the victim undergo a physical or psychological

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1 examination and (2) counsel's failure to "present witnesses in support of defendant's theory of the
 2 case." (*Id.*, at p. 5).

3 Respondents have filed the instant motion to dismiss. (ECF No. 11). Petitioner filed an
 4 opposition. (ECF No. 23), and respondents filed a reply (ECF No. 25).

5 **II. Discussion**

6 Respondents move to dismiss the federal habeas petition because it is untimely under the
 7 AEDPA statute of limitations. Respondents raise additional bases for dismissal, however, the Court
 8 finds that the untimeliness of the federal petition is dispositive in this case.

9 **A. Untimeliness of Federal Habeas Petition**

10 The Antiterrorism and Effective Death Penalty Act (AEDPA) amended the statutes
 11 controlling federal habeas corpus practice to include a one-year statute of limitations on the filing of
 12 federal habeas corpus petitions. With respect to the statute of limitations, the habeas corpus statute
 13 provides:

14 (d)(1) A 1-year period of limitation shall apply to an application
 15 for a writ of habeas corpus by a person in custody pursuant to the
 16 judgment of a State court. The limitation period shall run from
 17 the latest of—

18 (A) the date on which the judgment became final by the
 19 conclusion of direct review or the expiration of the time
 20 for seeking such review;

21 (B) the date on which the impediment to filing an
 22 application created by State action in violation of the
 23 Constitution or laws of the United States is removed, if the
 24 applicant was prevented from filing by such State action;

25 (C) the date on which the constitutional right asserted was
 26 initially recognized by the Supreme Court, if the right has
 27 been newly recognized by the Supreme Court and made
 28 retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or
 claims presented could have been discovered through the
 exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitations under this subsection.

28 U.S.C. § 2244(d).

A criminal defendant in Nevada has thirty days from the entry of judgment to file his notice of appeal. Nev. R. App. P. 4(b). If the defendant does not seek direct review from the highest state court, the conviction becomes final when the time for seeking such review elapses. 28 U.S.C. § 2244(d)(1)(A); *Hemmerle v. Schriro*, 495 F.3d 1069, 1073-74 (9th Cir. 2007); *Wixom v. Washington*, 264 F.3d 894, 898 (9th Cir. 2001). Once the judgment of conviction is final, the defendant has 365 days to file a federal habeas petition. 28 U.S.C. § 2244(d).

In the present case, the judgment of conviction was entered on April 13, 2006. (Exhibit 31). The time for directly appealing the judgment of conviction expired on May 15, 2006. Petitioner would have needed to file his federal petition by May 15, 2007. Petitioner filed his federal habeas petition in this Court on June 24, 2011, years after the AEDPA statute of limitations period had expired. (ECF No. 5, at p. 1).² Further, the Court notes that petitioner did not file his state post-conviction habeas corpus petition until December 24, 2009, which was over two years after the expiration of the AEDPA's statute of limitations. (Exhibit 57). An application for state post-conviction relief does not toll the AEDPA statute of limitations where the petitioner files it after the AEDPA statute of limitations has expired. *Jimenez v. Rice*, 276 F.3d 478, 482 (9th Cir. 2001). Petitioner's federal habeas petition was untimely filed, an issue that he does not dispute in his response to respondents' motion to dismiss. Absent equitable tolling or the establishment of actual innocence to excuse the AEDPA's statute of limitations, as discussed below, the petition must be dismissed as untimely. 28 U.S.C. § 2244(d).

² The federal petition indicates that petitioner mailed his petition on June 24, 2011. (ECF No. 5, at p. 1). Pursuant to the “mailbox rule,” federal courts deem the filing date of a document as the date that it was given to prison officials for mailing. *Houston v. Lack*, 487 U.S. 266, 270 (1988).

1 **B. Equitable Tolling and Actual Innocence Issues**

2 **1. Equitable Tolling**

3 The United States Supreme Court has held that the AEDPA's statute of limitations "is subject
 4 to equitable tolling in appropriate cases." *Holland v. Florida*, 130 S.Ct. 2549, 2560 (2010). The
 5 Supreme Court reiterated that "a petitioner is entitled to equitable tolling only if he shows: '(1) that
 6 he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his
 7 way' and prevented timely filing." *Holland*, 130 S.Ct. at 2562 (quoting *Pace v. DiGuglielmo*, 544
 8 U.S. 408, 418 (2005)). In the instant case, petitioner has failed to make any showing that he pursued
 9 his rights diligently and that any extraordinary circumstance prevented him from filing a timely
 10 federal petition. Petitioner is not entitled to equitable tolling.

11 **2. *Lee v. Lampert* Actual Innocence Exception**

12 The Ninth Circuit has joined the Sixth, Tenth, and Eleventh Circuits in holding that "where
 13 an otherwise time-barred habeas petitioner demonstrates that it is more likely than not that no
 14 reasonable juror would have found him guilty beyond a reasonable doubt, the petitioner may pass
 15 through the *Schlup* gateway and have his constitutional claims heard on the merits." *Lee v. Lampert*,
 16 653 F.3d 929, 937 (9th Cir. 2011). "In order to present otherwise time-barred claims to a federal
 17 habeas court under *Schlup*, a petitioner must produce sufficient proof of his actual innocence to bring
 18 him "within the 'narrow class of cases . . . implicating a fundamental miscarriage of justice.'" *Lee v.*
 19 *Lampert*, 653 F.3d at 937 (quoting *Schlup v. Delo*, 513 U.S. 298, 314-15 (1995)). "The evidence of
 20 innocence must be 'so strong that a court cannot have confidence in the outcome of the trial unless
 21 the court is also satisfied that the trial was free of nonharmless constitutional error.'" *Id.* at 937-38
 22 (quoting *Schlup v. Delo*, 513 U.S. at 316). "*Schlup* requires a petitioner 'to support his allegations of
 23 constitutional error with new reliable evidence [of actual innocence] – whether it be exculpatory
 24 scientific evidence, trustworthy eyewitness accounts, or critical physical evidence – that was not
 25 presented at trial.'" *Id.* at 938 (quoting *Schlup*, 513 U.S. at 324). "The habeas court then

1 ‘consider[s] all the evidence, old and new, incriminating and exculpatory,’ admissible at trial or not.”
 2 *Id.* (quoting *House v. Bell*, 547 U.S. 518, 538 (2006)). “On this complete record, the court makes a
 3 “probabilistic determination about what reasonable, properly instructed jurors would do.” *Id.*
 4 (quoting *House*, 547 U.S. at 538).

5 In the response to the motion to dismiss, petitioner argues that he has established actual
 6 innocence to excuse the filing of his untimely federal habeas petition. (ECF No. 23). The Court
 7 notes initially that petitioner failed to plead any facts supporting a claim of actual innocence in his
 8 federal petition. (ECF No. 5). In his response, petitioner asserts factual allegations and legal claims
 9 that were not asserted in his federal petition, including unauthenticated documents. (ECF No. 23).
 10 Petitioner’s response does not present any new evidence to show that he is actually innocent of the
 11 crime for which he was convicted, lewdness with a minor under the age of fourteen. Petitioner
 12 argues that he was under the influence of an unknown medication at the time he entered his plea.
 13 Petitioner argues that the Reno Police Department “destroyed exculpatory evidence.” (ECF No. 23,
 14 at p. 5). Petitioner further asserts that the victim’s counselor coached her on how to testify at trial,
 15 the victim’s mother fabricated allegations of sexual abuse to avoid eviction and prosecution for
 16 dealing drugs, and that the victim made inconsistent statements. (ECF No. 23, at pp. 3-4, 6-7).

17 For each of petitioner’s assertions, he fails to submit any new evidence to support his
 18 allegations. There is no evidence that petitioner was under the influence of any substances at the
 19 time he entered his plea. There is no evidence that the Reno Police Department destroyed
 20 exculpatory evidence. Even if petitioner could prove the truth of these allegations, they are not “new
 21 reliable evidence” required under *Schlup* that would prove that it is more likely than not that no
 22 reasonable juror would have convicted petitioner. *See Schlup*, 513 U.S. at 322-28.

23 Regarding petitioner’s claim that the victim was coached on how to testify and
 24 inconsistencies in the victim’s statements, this is not new evidence. That the victim was coached as
 25 to how to testify and inconsistencies in her preliminary hearing testimony and her statement to police
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1 came out during the preliminary hearing. (Exhibit 4, at pp. 16-38). Regarding petitioner's assertion
2 that the victim's mother's eviction from the apartment complex was the result of petitioner reporting
3 the mother for using the apartment for drug sales, petitioner was well aware of these claims at the
4 time he entered his guilty plea, and as such, these assertions are not "new reliable evidence" that
5 would establish actual innocence. Petitioner's assertions are insufficient to establish that no
6 reasonable juror would have convicted him, particularly in light of the preliminary hearing testimony
7 of the victim, and petitioner's own admission that the state possessed sufficient evidence for a
8 conviction when he entered his plea. (Exhibits 4 & 27, at pp. 5-8). Because petitioner does not
9 present new reliable evidence of his actual innocence, petitioner cannot pass through the *Schlup*
10 actual innocence gateway, and this Court cannot excuse petitioner's untimely filing of the federal
11 petition. *See Lee v. Lampert*, 653 F.3d 929 (9th Cir. 2011). The federal habeas petition is untimely
12 pursuant to the AEDPA statute of limitations, and petitioner is not entitled to equitable tolling or any
13 other equitable remedy to excuse the untimely filing of the federal petition. The petition is dismissed
14 with prejudice.

15 **III. Certificate of Appealability**

16 In order to proceed with an appeal, petitioner must receive a certificate of appealability. 28
17 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9th Cir. R. 22-1; *Allen v. Ornoski*, 435 F.3d 946, 950-951
18 (9th Cir. 2006); *see also United States v. Mikels*, 236 F.3d 550, 551-52 (9th Cir. 2001). Generally, a
19 petitioner must make "a substantial showing of the denial of a constitutional right" to warrant a
20 certificate of appealability. *Id.*; 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84
21 (2000). "The petitioner must demonstrate that reasonable jurists would find the district court's
22 assessment of the constitutional claims debatable or wrong." *Id.* (*quoting Slack*, 529 U.S. at 484). In
23 order to meet this threshold inquiry, the petitioner has the burden of demonstrating that the issues are
24 debatable among jurists of reason; that a court could resolve the issues differently; or that the
25 questions are adequate to deserve encouragement to proceed further. *Id.* This Court has considered
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1 the issues raised by petitioner, with respect to whether they satisfy the standard for issuance of a
2 certificate of appealability, and determines that none meet that standard. The Court will therefore
3 deny petitioner a certificate of appealability.

4 **IV. Conclusion**

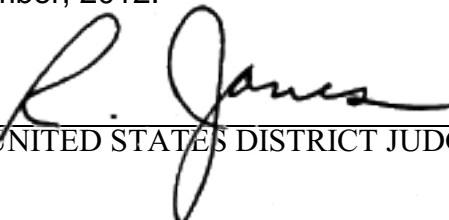
5 **IT IS THEREFORE ORDERED** that respondents' motion to dismiss (ECF No. 11) is
6 **GRANTED** and the federal petition for a writ of habeas corpus is **DISMISSED WITH**
7 **PREJUDICE.**

8 **IT IS FURTHER ORDERED** that petitioner's motions at **ECF Nos. 28, 29, 31, and 37** are
9 **DENIED.**

10 **IT IS FURTHER ORDERED** that petitioner is **DENIED A CERTIFICATE OF**
11 **APPEALABILITY.**

12 **IT IS FURTHER ORDERED** that the Clerk **SHALL ENTER JUDGMENT**
13 **ACCORDINGLY.**

14 Dated this 21st day of September, 2012.

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17 UNITED STATES DISTRICT JUDGE
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